IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 14TH DECEMBER 2006 / 23RD AGRAHAYANA 1928

WP(C).No. 32230 of 2006(J)

AGAINST THE ORDER IN IA 4940/2006 IN
OS.246/2003 of ADDL.M.C.,KOZHIKODE-I

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PETITIONER:

MUNDAKKARA KARTHI,
D/O.PARUKUTTY, PALATH P.O.,
KOZHIKODE.

BY ADV. SRI.V.G.ARUN

RESPONDENTS:

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1. PANDYADATH THANKAM,
WIFE OF IMBICHI, PADINJATTUM MURI,
KOZHIKODE.

2. MUNDAKKARA NISHA, DO. DO.

3. MUNDAKKARA MALU, DO. DO.

4. MUNDAKKARA JANU, DO. DO.

5. MUNDAKKARA MALUKUTTY, DO. DO.

6. MUNDAKKARA MANI, DO. DO.

7. NELLIYATTU RADHA,
MUNDAKKARA, MAKKADA, KOZHIKODE.

8. NELLIYATTU NISHA, DO. DO.

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 14/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.32230 OF 2006

Dated 14th December 2006

JUDGMENT

Petitioner is second defendant in O.S.246/03 on the file of First Additional Munsiff court, Kozhikode. Pursuant to the preliminary decree, I.A.2799/05 a final decree application was filed before that court. Commissioner was appointed. Commissioner divided the property in accordance with the preliminary decree and submitted a report. Petitioner was originally set ex-parte at the preliminary decree stage as well as final decree stage. Subsequently petitioner filed an application in the final decree application, to set aside the ex-parte order as against him. Ex-parte order in the final decree application against petitioner was set aside. Petitioner thereafter filed I.A.4940/06 an application under Order XXVI Rule 10 of Code of Civil Procedure, to remit back the report contending that plot C allotted to him as per the report submitted by the commissioner is the eastern part and is not fit

for cultivation and other properties are cultivable properties and division is not equitable. Under Ext.P3 order learned Munsiff dismissed the application holding that petitioner who remained ex-parte till the fag end of final decree proceedings cannot be permitted to disturb the work done by the commissioner. This petition is filed under Article 227 of Constitution of India challenging Ext.P3 order.

2. Learned counsel appearing for petitioner was heard. Arguments of learned counsel appearing for petitioner was that as is clear from the details of improvements and shares allotted to different sharers, the eastern plot C allotted to petitioner is in the hilly area and remaining plots are valuable plots and commissioner has valued the said property also at the same rate for which other properties were valued and for the reason that petitioner was set ex-parte earlier division cannot be in inequitable and in such circumstances opportunity has to be granted to petitioner to get a proper division and allotment of share.

3. Ext.P3 order is only an interlocutory order. As like any other interlocutory order, court is competent to take a different view at a subsequent

stage, if on the evidence learned Munsiff is satisfied that division is not equitable. Grievance of petitioner is that share allotted to him as plot C is not a valuable or fertile as the remaining plots alloted to other shares and still that property is also valued at the same rate. These are matters to be considered by the learned Munsiff at the time of passing of final decree. Petitioner is entitled to lead evidence to prove the objections raised in I.A.4940/06. If on the evidence learned Munsiff finds that division and allotment are not equitable, Ext.P3 order will not stand in the way of learned Munsiff to direct the commissioner to submit a further report.

Writ petition is disposed of accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.